No. 09-315

Supreme Court, U.S
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IN THE

Supreme Court of the United States

DONNA KAY BUSCH, In Her Individual Capacity
And As The Parent And Next Friend
Of Wesley Busch, A Minor,

Petitioner,

v.

MARPLE NEWTOWN SCHOOL DISTRICT, MARPLE NEWTOWN SCHOOL DISTRICT BOARD OF DIRECTORS, ROBERT MESAROS, Former Superintendent Of The Marple Newtown School District, And THOMAS COOK, Principal Of Culbertson Elementary School,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

ELLIS H. KATZ
JONATHAN P. RIBA
SWEET, STEVENS, KATZ
& WILLIAMS LLP
331 East Butler Avenue
New Britain, PA 18901
(215) 345-9111

MARK A. SERENI
Counsel of Record
GREGORY S. GERSON
DIORIO & SERENI LLP
21 West Front Street
Media, PA 19063
(610) 565-5700

Attorneys for Respondents

226369

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

COUNTERSTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Whether the petition for a writ of certiorari must be denied because petitioner has demonstrated no compelling reasons to grant certiorari with respect to the Third Circuit's decision that a School District may lawfully prevent a parent who is invited to share a story as part of her five-year-old son's curriculum-based show-and-tell activity from reading Bible verses aloud to a captive audience of kindergarten students in a public school classroom during class?

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RULE

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This case involves the unlawful effort of petitioner Donna Kay Busch (Busch), an Evangelical Christian,[1] to read aloud from the Bible to a class of public school kindergarten students during a curriculum-based exercise for her son Wesley Busch's "All About Me" week.

Ironically, this case is not at all about Wesley – it is all about Busch. Busch's mission – to spread what she believes to be the literal word of God to as many people as possible – is clear and, to some, quite commendable. Equally clear is the law – it is lawful under the

[1] Busch describes herself as an Evangelical Christian who "received Christ as [her] Savior" in 1987. C.A. App. at 1557 & 1234. Since she was a young girl, Busch has believed that the Bible is the literal word of God. C.A. App. at 1362. Eric Busch, her husband, described an Evangelical as "one who brings God's word to the world." According to religion expert Brian Ortale:

> The Evangelical Christian believes in the power of the word of God to reveal God and to make God present in the reading or preaching of the word and in the heart, mind and soul of anyone who hears the word of God. This is, again, what Martin Luther understood to be the power of the word of God to bring one to faith. Hearing or reading the word brings one to faith and faith brings one to salvation. Evangelical Christians believe not only in the power of the word but in the mission to proclaim the word of God to the world. * * * The Evangelical Christian believes salvation and entrance into the kingdom of God is to be accomplished by spreading the good news that Jesus has redeemed God's people. God saved the world through the death and resurrection of God's son Jesus and Evangelical Christians believe it is the mission of the church to proclaim this message so that all people might come to faith in Jesus Christ and be saved.

C.A. App. at 0131 & 0814-0825.

circumstances presented for a school district to prevent Busch or any other adult from reading the Bible or any other religious text aloud to a captive audience of kindergarten students as part of a curriculum-based activity in a Pennsylvania public school classroom.

COUNTERSTATEMENT OF THE CASE

A. Five-Year-Old Wesley Busch And His "All About Me" Week

During the 2004-2005 school year, Wesley was a five-year-old kindergarten student at Culbertson Elementary School in the Marple Newtown School District. C.A. App. at 0055-0056. In October of 2004, Wesley participated in his kindergarten show-and-tell activity called "All About Me." "All About Me" is a unit under the School District's kindergarten social studies curriculum. C.A. App. at 1071. Its objectives include that the student will identify individual interests and learn about others. C.A. App. at 1080.

Jaime Reilly, Wesley's kindergarten teacher, distributed a teacher handout (the "All About Me" handout) to parents at Back-to-School Night. C.A. App. at 1085 & 1155-1156. The "All About Me" handout stated, in part:

> Each child will have the opportunity to share information about themselves during their 'All About Me' week. To start off your child's 'All About Me' week please send in a poster with pictures, drawings, or magazine cut outs of your child's family, hobbies, or interests. Your child may bring in a special toy or stuffed animal during the week to introduce to the

> class. Your child may also bring in a favorite snack to share with the class during their 'All About Me' week.

The "All About Me" handout also contained a general invitation to parents:

> If any parent would like to come to school to share a talent, short game, small craft or story with us during your child's 'All About Me' week please contact me 1 week in advance to schedule a day and time.

Culbertson Elementary asked parents to call a week ahead so that the school would know what the parent intended to present. C.A. App. at 1008-1009. Busch did not attend the Back-to-School Night for Wesley's kindergarten class, so Reilly gave her the "All About Me" handout soon after that event. C.A. App. at 0134.

Busch admits that the "All About Me" handout did not say that the School District gives the right to the child to pick his favorite book and have his parent read it aloud to the class. C.A. App. at 1195. She further admits that she could not point to anything in writing that she ever received from the School District which said that, as part of the "All About Me" classroom exercise, the student is invited to pick his favorite book and have the parent read it aloud to the class. C.A. App. at 1195-1196.

B. Wesley Participates In His "All About Me" Week By Making A Poster With A Picture Of A Church With "I Love To Go To The House Of The Lord" Written Under It And Presenting His Poster To His Kindergarten Classmates.

Wesley in fact participated in his "All About Me" week exercise by making a poster with his mother that included photographs of himself with his hamster, his brothers, his parents, his best friend at the time, and a picture of a church cut out from construction paper. Third Circuit Opinion, Pet. App. at 5a; C.A. App. at 1211. At Wesley's request, Busch wrote under the picture of the church: "I love to go to the House of the Lord" or "I like to go to church" or "something like that." Third Circuit Opinion, Pet. App. 5a; C.A. App. at 1216. Culbertson Elementary displayed Wesley's poster on his classroom wall, and his mother remembers seeing it there. C.A. App. at 1081 & 1218. Wesley, like his classmates, had the opportunity to present his poster to the class and talk about the various items on it, including the picture of the church. C.A. App. at 1082.

C. Busch Tries To Make Wesley's "All About Me" Week "All About Her."

Despite the unequivocal language of the written "All About Me" hand-out inviting parents to, among other things, share "a story," Busch claims that she was invited to share Wesley's "favorite book" with his class. Busch testified that she visited Culbertson to meet with Reilly about one week before Wesley's "All About Me" week. C.A. App. at 1176. Busch stated that her purpose

was "[t]o find out about what, you know, the Me Week, what I needed to do for his Me Week." C.A. App. at 1181-1182. Busch claims that Reilly told her that she could come in and read Wesley's favorite book. C.A. App. at 1198. Reilly does not recall having any such conversation, and there is no record of Busch signing in at the visitors' desk as she had done before. C.A. App. at 1110. In either case, Busch admits that before showing up in Reilly's classroom on the date of the actual classroom incident, she never told Reilly that she intended to read aloud from the Bible. C.A. App. at 1227-1228. Busch further admits that the verbal invitation that she claimed Reilly had made to her to come in and read from Wesley's favorite book carried with it the restrictions that the law would place upon what one could read to the kindergarten class. C.A. App. at 1207-1208.

Busch testified that a week or so before the actual classroom incident, she said to Wesley, "something . . . like your teacher, you know, said I could come in and read your favorite book. Which book do you want me to take in?" C.A. App. at 1174. She claims that Wesley said, "the Bible."[2] C.A. App. at 1174. Wesley and Busch then

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[2] Wesley's babysitter and friend of the Busch family, Judy Harper (Harper), testified that before he started school, Wesley's favorite book was the Dr. Seuss children's storybook entitled, "*Are You My Mother?*" (Deposition of Judy Harper (Harper Deposition) at 11, lines 10-25). After he started kindergarten, Wesley's favorite book became "*Brown Bear, Brown Bear,*" a children's storybook. (Harper Deposition at 12, lines 11-18; & 12, line 19). Harper testified that she had no reason to believe that the Bible was Wesley's favorite book. (Harper Deposition at 13, lines 16-21).

talked about what he wanted her to make for his favorite treat, and about the poster that he was going to make, and "things like that." C.A. App. at 1174-1175. For Wesley's poster, Busch let him pick out what he wanted to put on it. C.A. App. 1211.

D. It Was Busch – Not Wesley – Who Decided To Read Aloud From The Original King James Version Of The Bible And It Was Busch – Not Wesley – Who Chose To Read Psalm 118.

Yet, it was Busch – not Wesley – who decided to read aloud from the original King James version of the Bible. C.A. App. at 1363. And it was Busch – not Wesley – who decided to read aloud from Psalm 118. C.A. App. at 1247.

Busch testified that she probably made the decision to read aloud from Psalm 118 the night before the actual classroom incident. C.A. App. at 1252. Busch claims to have randomly picked Psalm 118. C.A. App. at 1251-1252. The verses from Psalm 118 which Busch claims she wanted to read provide:

> Psa 118:1 O give thanks unto the LORD; for he is good: because his mercy endureth for ever.
>
> Psa 118:2 Let Israel now say, that his mercy endureth for ever.
>
> Psa 118:3 Let the house of Aaron now say, that his mercy endureth for ever.

> Psa 118:4 Let them now that fear the LORD say, that his mercy endureth for ever.
>
> * * *
>
> Psa 118:14 The LORD is my strength and song, and is become my salvation.

C.A. App. at 0130 & 0708.

Busch admitted that Psalm 118 praises God. C.A. App. at 1375-1376. Religion expert Brian Ortale describes Psalm 118 as a "powerful tool for proselytizing by the Christian community":

> Psalm 118 remains a hymn of thanksgiving to God for God's mercy and God's action on behalf of God's faithful people. However, the specific use of Psalm 118 in the Christian community regards Jesus as the stone refused by the builders. In fact the image of Jesus as the stone refused by the builders is used a number of times in the Bible. Six different passages of the Greek Scriptures contain the image of Jesus as the stone refused by the builders. This multiple use leads one to presume that any reference to Psalm 118 in or by the Christian community would include this particular meaning referring to Jesus as the stone refused by the builders and therefore also the source of salvation from God.

The identification of Jesus as the stone refused by the builders and now the source of salvation from God makes Psalm 118 a powerful tool for proselytizing by the Christian community. The message is that Jesus is the stone rejected by some but exalted by God, the cap stone. Jesus is now the reason behind the utterance of verse 14, *The Lord is my strength and song, and is become my salvation.*[3] Jesus is the LORD. And Jesus is the source of salvation.

The primitive Christian community used the metaphor identifying Jesus with the stone refused by the builders to condemn those who refused faith in Jesus. The reference to Jesus as the stone rejected by the builders become by God the source of salvation was used as a warning to those who were aware of the message of Jesus but did not accept it in faith, did not accept Jesus as Lord and did not receive salvation. This warning to accept salvation carried with it the promise of condemnation, damnation, and eternal suffering for those who did not believe and those who were not saved. It is necessary to acknowledge the caustic nature of the metaphor as it was used to condemn those who did not become members of the primitive Christian community. It is necessary to acknowledge the manner in which it was used

[3] Busch intended to read verse 14.

> by the primitive Christian community and has continued to be used throughout Christian tradition.

C.A. App. at 0131 & 0814-0821.[4]

E. Busch Attempts To Read Bible Verses Aloud To A Captive Audience Of Kindergarten Students In A Public School Classroom During A Curricular Activity.

On October 15, 2004, Busch signed in at Culbertson Elementary, listing "Reading to Children" as the purpose, with "Time In" at 8:56 a.m. and "Time Out" at 9:15 a.m. C.A. App. at 0128 & 0395. When Busch came into the classroom, Reilly was sitting in a rocking chair in the center. C.A. App. at 1262. Busch walked up to Reilly's desk, where she remained standing. C.A. App. at 1262. Busch was holding her Bible, which had a red leather cover and the title, "Holy Bible" on the outside. C.A. App. at 1263.

Busch testified that she stooped down next to Reilly and said something like, "whenever you're ready, let me know," and she told Reilly she wanted to read from Psalm 118. C.A. App. at 1263-1264. Reilly said "Oh" and

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[4] The School District's Reading Supervisor conducted a readability study of the passage from the Bible which Busch planned to read aloud to the kindergarten class. C.A. App. at 0938-0939, 0130 & 0709. A readability study determines the reading level of the text or selection. C.A. App. at 0938. According to this study, "[u]sing the *King James Version*, the grade level readability of Psalm 118 is 7th grade." C.A. App. at 0130 & 0709.

when Busch asked whether that would be okay, Reilly[5] said she would have to ask Principal Thomas Cook (Cook).[6] C.A. App. at 1264. Busch's desire to read from Psalm 118 caused Reilly concern because, in her opinion, reading aloud from the Bible under these circumstances would be religious expression. C.A. App. at 1098.

Reilly went "pretty immediately" out into the hallway. C.A. App. at 1269. Busch saw Reilly speak with Cook in the hallway right outside the door. C.A. App. at 1269. After Reilly and Cook were finished talking, Reilly came back into the classroom and told Busch that Cook would like to speak with her. C.A. App. at 1272. Reilly never told Busch that she could not read aloud from the Bible. C.A. App. at 1275.

Busch went to speak with Cook outside the door in the hallway. C.A. App. at 1275. According to Busch, Cook told her that she cannot read aloud from the Bible because "it's against the law of separation of church and state and we can't let that kind of thing happen in his school." C.A. App. at 1276-1277. Busch said that Cook used the word "proselytizing." C.A. App. at 1278. Busch understood Cook to be "saying I couldn't try to convert souls." C.A. App. at 1280.

While Cook and Busch were in the hall talking, Reilly attended to the children. C.A. App. at 1112. After that, Busch came back into the classroom and asked Reilly if she had something else that she could read to the

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[5] Reilly is of the Christian faith. C.A. App. at 0136.

[6] Cook has served as assisting minister in the Christian faith since approximately 1985. C.A. App. at 0133.

children. C.A. App. at 1111. Reilly offered Busch a Halloween book. C.A. App. at 1294. Busch told Reilly that she did not "believe in that. I won't read that."[7] C.A. App. at 1295. Reilly said, "Okay, I will find you another one," and she found a book on counting, which Busch then read. C.A. App. at 1295-1296.

Superintendent Robert Mesaros (Mesaros) testified that he supported Cook's decision because "reading from sacred scripture, in this case the Bible, to a captive audience of students would be a violation of the school code and the district policy." C.A. App. at 0889. Mesaros testified that it was important for the teacher, the principal and the District to protect the students from an intervention, regardless of how meaningful these activities are to Busch and her family. C.A. App. at 0891.

F. Busch Testifies That Parents Had The Right To Read Verses Praising Satan, And Books Advocating Nazism, The Killing Of All Christians And Communism To Wesley And His Kindergarten Classmates In Their Public School Classroom As Long As It Related To Their Child – And Her Counsel Agreed At Oral Argument.

Busch testified that the District would violate a parent's freedom of religion or speech if it prohibited the parent's attempt to read something about Satan to

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[7] Busch believes that Halloween is a "byproduct" of witchcraft. C.A. App. at 1298. Busch told Harper that she believes that Halloween is Satan, and that Culbertson's Pumpkin Festival is related to Satan. (Harper Deposition at 17, lines 19-25; & 18, line 2).

the class. C.A. App. at 1410-1411. Eric Busch, her husband, testified that he agreed with his wife that it would be lawful for a parent to read the words "O give thanks unto *Satan*; for he is good: because his mercy endureth for ever" to the kindergarten class in a public school classroom '[i]n the context of "Me Week" where the child is picking his favorite book . . . .' C.A. App. at 1628-1629. In Busch's opinion, the District created an opportunity for a child to pick and a parent to read to the rest of the class a book which advocates Nazism, the killing of all Christians or communism. C.A. App. at 1412.[8]

Busch's counsel echoed Busch's all-or-nothing stance at oral argument before the Third Circuit:

> At her deposition, Busch testified that the school would not be able to restrict a parent in Wesley's class who, as part of his or her child's "All About Me" week, wished to read material advocating extreme violence and discrimination. We think it is fair to discount these statements, which were elicited by opposing counsel's pointed questioning. When presented with less provocative hypothetical scenarios at oral argument on this appeal, however, Busch's attorney similarly asserted that no line drawing by the school would have been permissible so long as a parent's

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[8] In Busch's opinion, the only subject matter the School District did not open up the opportunity for a child to pick and a parent to read from to the class, would be sexual content. C.A. App. at 1413.

> message related to his or her child. The gist of Busch's testimony and counsel's argument is that Busch believes schools must choose between allowing all invited parent speech or allowing none at all.

Pet. App. at 17a n.9.

It is this Pandora's box that Busch invites the United States Supreme Court to open.

G. Busch Files Suit, And The District Court Enters Summary Judgment In Favor Of Respondents On All Claims.

On May 2, 2005, Busch, individually and as Wesley's parent, filed suit[9] against the Marple Newtown School District, its School Board, its then Superintendent, and the principal of Culbertson Elementary School based on Cook's request that Busch not read aloud from the Bible to a classroom of public school kindergarten students during a curriculum-based classroom exercise. C.A. App. at 0051-0066. On cross-motions for summary judgment, the district court granted summary judgment in favor of respondents on all claims. On appeal, the United States Court of Appeals for the Third Circuit affirmed.

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[9] In her Complaint, Busch sought relief for alleged violations of the Free Speech, Establishment and Equal Protection Clauses, and the Pennsylvania Constitution. C.A. App. at 0051-0066. Busch's Petition is limited to her alleged free speech claim. Petition at 7 n.2.

H. The Third Circuit Affirms The District Court's Order.

In its Opinion, the Third Circuit stressed from the outset that the elementary school setting – "particularly the kindergarten classroom" – is a unique forum for considering competing First Amendment and pedagogical interests. Noting that public schools may at certain times take on the characteristics of public fora by intentionally opening up their facilities for public discourse, the Third Circuit distinguished traditional classroom activities from that category: "But in classrooms, during school hours, when curricular activities are supervised by teachers, the nonpublic nature of the school is preserved. Speech occurring during these activities may be regulated under standards different from those that would apply in public fora." Pet. App. at 12a.

Relying on its prior decision in *Walz v. Egg Harbor Township Board of Education*, 342 F.3d 271 (3d Cir. 2003), the Third Circuit explained that, in the elementary school classroom, the appropriateness of student expression depends on several factors, including the type of speech, the age of the speaker and audience, the school's control over the activity in which the expressions occurs, and whether the school solicits individual views from students during the activity. *Id.*, *citing Walz*, 342 F.3d at 278. "'[T]he age of the students bears an important inverse relationship to the degree and kind of control a school may exercise: as a general matter, the younger the students, the more control a school may exercise.'" *Id.*, *quoting Walz*, 342 F.3d at 276.

According to the Court, unlike high school students, for elementary school students, the line between school-endorsed speech and merely allowable speech is blurred, "'not only for the young, impressionable students but also for their parents who trust the school to confine organized activities to legitimate and pedagogically-based goals.'" *Id. at 13a, quoting Walz*, 342 F.3d at 277. As a result, restrictions on speech during a school's organized curricular activities are within the school's legitimate area of control because they help create the structured environment in which they school imparts basic social, behavioral and academic lessons. "'The curricular standards applied during these activities, 'especially those that occur in kindergarten and first grade, when children are most impressionable, should not be lightly overturned.'" *Id.*

Noting that some classroom discussion of religion or religious practices may be consistent with appropriate curricular standards, the Third Circuit recognized that "classroom speech promoting religion or specific religious messages presents special problems for educators." *Id.* The Third Circuit stated that whether a school solicits speech from students helps determine whether student speech is consistent with the school's pedagogical goals. "But the fact the speech was invited during a curricular activity does not necessarily prevent the school from limiting the student's response." *Id.* at 14a. According to the Court, the school may properly require, for example, that the solicited speech respond to the subject matter at hand, and may require that classroom responses conform to the mode of presentation requested.

Turning to the issue of parent participation in curricular activities, the Third Circuit maintained:

> Likewise, when parents participate in an elementary school's curricular activities, the school may impose the same requirement-that they refrain from promoting specific messages in class. The school's pedagogical considerations are present, and are perhaps heightened, when a parent is the speaker because parents, much like teachers, are typically held in high regard and viewed as authoritative by young children. By inviting participation in curricular activities, educators do not cede control over the message and content of the subject matt . presented in the classroom. Were teachers or school administrators required to do so, individual students or parents could use the classroom to promote any message in the guise of a pedagogically approved curricular activity.

Id. at 15a. The Third Circuit also stressed that educators should be free to seek appropriate ways to encourage parent participation in the education of their children. *Id.* The Court was concerned that such efforts could be jeopardized if, once invited to share details about their family experience, parents could express any message of their choosing as long as it related in some way to their child. According to the Third Circuit, "[i]n the elementary school setting, and particularly at the kindergarten level, educators would face the dilemma of either foregoing valuable curricular activities or foregoing the ability to control the pedagogical direction of their classrooms." *Id.* at 16a.

Applying these principles to the facts before it, the Third Circuit found that Busch attempted to read aloud Bible passages to students in a kindergarten classroom with the teacher present as part of a curricular exercise. The Court also noted that, in this context, the school was concerned that she would "'promote a religious message through the channel of a benign classroom activity.'" *Id.*, *quoting Walz*, 342 F.3d at 280.

The Court rejected Busch's argument that the nature of the "All About Me" activity altered the context of the speech in two ways. With respect to the first, Busch argued that the activity's focus on Wesley during his "All About Me" week prevented any perception of school endorsement. Noting that show-and-tell type exercises – commonplace in elementary school curricula – are valuable pedagogical tools for furthering the behavioral and social development of children, the Third Circuit stressed that "like other curricular activities in the kindergarten classroom, 'show and tell' assignments generally presume the school may limit the content of the presentations." *Id.* at 16a. The Court also stressed that, unlike in *Walz*, the speaker here was not a student. "That it was a student's parent further blurs 'the line between school-endorsed speech and merely allowable speech.'" *Id.* at 17a, *quoting Walz*, 342 F.3d at 277.

The Third Circuit also rejected Busch's second argument – that the statement in *Walz* that "[i]ndividual student expression that articulates a particular view but that comes in response to a class assignment or activity would appear to be protected" – supports her contention that her speech should have been permitted because she intended to express a solicited view on the pertinent

subject matter. Put another way, Busch maintained that Culbertson Elementary invited her to participate in Wesley's "All About Me" week, where "all about Wesley" was the subject matter, and she intended to present a viewpoint about Wesley. Busch therefore contends that once she was invited to speak, any restriction on her speech was impermissible as long as her speech was about Wesley. The Court wisely rejected this untenable position:

> The school need not choose, however, between soliciting information about students as part of curricular activities and opening the classroom to any content the speaker chooses to disseminate. In crafting a curriculum, school officials face the sensitive task of exposing children to diverse traditions and cultural experiences while also remaining mindful of the expectations and rights of the children and their parents. Principal Cook disallowed a reading from holy scripture because he believed it proselytized a specific religious point of view. As in *Walz*, the school's reasons – to prevent promotion of a religious message in kindergarten – were "designed to prevent . . . speech that, if permitted, would be at cross-purposes with its educational goal and could appear to bear the school's seal of approval." *Id.* at 280.

Id. at 17a-18a.

The Third Circuit also rejected Busch's argument that Culbertson Elementary's restriction on her speech was unrelated to the legitimate purpose of avoiding promotion of religious messages generally but was instead motivated by its desire to censor her and Wesley's particular religious beliefs. According to the Third Circuit:

> But the unchallenged record demonstrates the school permitted Wesley, in the classroom and as part of his "All About Me" week, to express his religious belief. These beliefs were featured on his "All About Me" poster as a depiction of a church and a statement expressing that he likes to attend church. Wesley was permitted, as other students were, to present his poster to the class in the manner he desired. Accordingly, the school's actions do not appear to have been motivated by discrimination against Wesley's religion. Rather, the school identified a significant difference between the identification of religious belief and certain holiday-oriented religious materials, on the one hand, and a parent's reading of holy scripture, on the other hand, which it considered a form of proselytizing.
>
> It may be reasonably argued that a mother's reading of the Bible to a kindergarten class, especially sublime verses from the Book of Psalms, should be permitted. In this sense and for many, the conduct is benign and the message inspiring. But a

reading from the Bible or other religious text is more than a message and unquestionably conveys a strong sense of spiritual and moral authority. In this case, the audience is involuntary and very young. Parents of public school kindergarten students may reasonably expect their children will not become captive audiences to an adult's reading of religious texts.

The dilemma here is that our jurisprudence seeks to affirm the right of individuals to identify and practice their religion and at the same time to forestall the establishment of religion. In this case, as in many others, these fundamental principles are in tension with one another. Often a vehicle of religious practice, speech is sometimes undertaken in private, sometimes in a group, and sometimes, as here, in a public school. The public school setting may implicate the Establishment Clause, especially where public authority undertakes or is reasonably perceived to have undertaken to give one religious belief official approval or approval over other religious beliefs. And this tension is particularly vexing in a public school where attendance is compulsory and moral and social values are being developed along with basic learning skills. In seeking to address that tension, elementary school administrators and teachers should be given latitude within a range of reasonableness related to preserving the school's educational goals. *See Hazelwood*

> *Sch. Dist.*, 484 U.S. at 273, 108 S.Ct. 562; *Walz*, 342 F.3d at 277-78, 280-281. In this case, the school's actions were not unreasonable.

Id. at 19a-20a.

The Third Circuit affirmed the Order of the lower court.

I. Busch Files A Petition For A Writ Of Certiorari.

On September 9, 2009, Busch filed the present Petition for a Writ of Certiorari. In her Petition, Busch seeks certiorari review of the alleged issue of "[w]hether a public school may, consistent with the First Amendment, engage in viewpoint discrimination of invited speech based solely on the 'reasonableness' of the restriction, rather than a compelling interest."

As more fully set forth below, the Third Circuit did not hold that respondents had engaged in viewpoint discrimination, or even address such an issue in dictum. Accordingly, the standard to be applied in such a case is the proper subject of law review commentary and scholarly debate, not certiorari review under well-established case law.

REASONS FOR DENYING THE PETITION

A. The Petition Must Be Denied Because It Fails To Present Compelling Reasons For Certiorari Review By This Court.

"Review on a writ of certiorari is not a matter of right, but of judicial discretion." U.S. Sup. Ct. R. 10. "A petition for a writ of certiorari will be granted only for compelling reasons." *Id.*

Here, Busch purports to base her Petition on subsection (a) of Rule 10, that is, that the Third Circuit allegedly "has entered a decision in conflict with the decision of another United States court of appeals on the same important matter . . . ."

As more fully set forth below, Busch has failed to identify the decision of another United States court of appeals on the same important matter decided by the Third Circuit in this case. Rather, her Petition purports to rely on an alleged split of authority in the courts of appeals on an issue which was neither discussed by the Third Circuit nor a basis for its holding.

Because the Petition fails to set forth compelling reasons why Busch's petition for a writ of certiorari should be granted, it must be denied.

1. The Petition Improperly Seeks An Advisory Opinion And Also Runs Afoul Of Several Fundamental Rules Developed By This Court For Its Own Governance.

The Petition characterizes the question presented for review as:

> Whether a public school may, consistent with the First Amendment, engage in viewpoint discrimination of invited speech based solely on the "reasonableness" of the restriction, rather than a compelling interest?

Yet, the Third Circuit did not address – either in its majority opinion or in dictum[10] – the alleged issue of viewpoint discrimination or the standards applicable to such a case. Judge Hardiman candidly acknowledged this fact in his Dissenting and Concurring Opinion:

> The Supreme Court has consistently considered two important questions in Free Speech Clause cases involving private speech: (1) whether the state's regulation of speech is based on subject matter or viewpoint; and (2) whether the speech being regulated takes place in a public forum, a limited public forum, or a nonpublic forum. ***The majority does not discuss the first question.***

Pet. App. at 24a (emphasis added).

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[10] Even dictum would be an insufficient basis for certiorari review. *See Kokkonen v. Guardian Life Insurance Company of America*, 511 U.S. 375, 379 (1994)("It is to the holdings of . . . cases, rather than their dicta, that we must attend . . . .").

Absent a ruling by the Third Circuit on the question presented for review, the Petition improperly seeks an advisory opinion from this Court,

> which a federal court should never issue at all, see *Hayburn's Case*, 2 Dall. 408, 1 L.Ed. 436 (1792), and *especially* should not issue with regard to a constitutional question, as to which we seek to avoid even *non* advisory opinions, see, *e.g.*, *Ashwander v. TVA*, 297 U.S. 288, 347, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring).

City of Chicago v. Morales, 527 U.S. 41, 77 (1999) (Scalia, J., dissenting).

The Petition also runs afoul of several fundamental rules developed by this Court for its own governance "under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision," including:

> 2. The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.' *Liverpool, N.Y. & Phila. Steamship Co. v. Emigration Commissioners*, 113 U.S. 33, 39, 5 S.Ct. 352, 355, 28 L.Ed. 899; *Abrams v. Van Schaick*, 293 U.S. 188, 55 S.Ct. 135, 79 L.Ed. 278; *Wilshire Oil Co. v. United States*, 295 U.S. 100, 55 S.Ct. 673, 79 L.Ed. 1329. 'It is not the habit of the court to decide questions of a constitutional nature unless absolutely

> necessary to a decision of the case.' *Burton v. United States*, 196 U.S. 283, 295, 25 S.Ct. 243, 245, 49 L.Ed. 482.
>
> 3. The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' *Liverpool, N.Y. & Phila. Steamship Co. v. Emigration Commissioners*, supra. Compare *Hammond v. Schappi Bus Line, Inc.*, 275 U.S. 164, 169-172, 48 S.Ct. 66, 72 L.Ed. 218.

Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

Because the Petition seeks an advisory opinion on a constitutional issue, requests the Court to anticipate a question of constitutional law in advance of the necessity of deciding it and asks the Court to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, it must be denied.

2. The Petition Fails To Demonstrate Any Conflict Among The Circuits On The Issue Actually Decided By The Court Of Appeals Below.

The Petition fails to cite any case other than the present that addresses the unique issue decided by the Court of Appeals below – whether a School District may lawfully prevent a parent who is invited to share a story as part of her five-year-old son's curriculum-based show-

and-tell activity from reading Bible verses aloud to a captive audience of kindergarten students in a public school classroom during class.

Absent another case on point, there is no conflict among the circuits, much less a split. Because there is no split among the circuits on the specific issue decided below, the Petition must be denied for this reason as well.

3. The Cases Cited By Busch In Alleged Support Of Her Petition Are Inapposite.

Not one of the seven cases relied upon by Busch as evincing an alleged "split among the Circuits" involved the unique setting of the public kindergarten classroom in the context of a parent's attempt to read Bible verses aloud to a captive audience of kindergarten students during a curriculum-based activity.

To the contrary, six of the cases cited by Busch were decided in the context of a high school — *Searcey v. Harris*, 888 F.2d 1314 (11th Cir. 1989) and *Planned Parenthood of Southern Nevada, Inc. v. Clark County School District*, 941 F.2d 817 (9th Cir. 1991) involved speech by an *outside entity*; *Bannon v. School District of Palm Beach County*, 387 F.3d 1208 (11th Cir. 2004) and *Fleming v. Jefferson County School District R-1*, 298 F.3d 918 (10th Cir. 2002) involved *high school student* speech; and *Downs v. Los Angeles Unified School District*, 228 F.3d 1003 (9th Cir. 2000) and *Ward v. Hickey*, 996 F.2d 448 (1st Cir. 1993) involved *high school teacher* speech.

The only case involving a kindergarten student – *Peck v. Baldwinsville Central School District*, 426 F.3d 617 (2d Cir. 2005) – is easily distinguishable both legally and factually from the facts of this case.

In *Peck*, a kindergarten student drew a poster that depicted trees, grass, people recycling and a "robed, praying figure" intended to be Jesus in response to an assignment to create a poster illustrating ways to help the environment. The student's teacher, when hanging all of the students' posters for an environmental assembly, asked a parent volunteer to fold the poster in half so that the portion depicting Jesus was concealed.

Here, unlike the student in *Peck*, it is undisputed that Wesley's expression was honored. Wesley was permitted to share with his class his poster with a church and the words to the effect of "I love to go to the house of the Lord," and his poster was displayed along with those of his classmates.

As more fully set forth above, this case is not all about Wesley – it is all about Busch. Unlike the plaintiff kindergarten student in *Peck*, this case involves a parent who claims that she had the right to read verses from the Bible aloud to a public school classroom of kindergarten students during a curricular activity. *Peck* is therefore inapposite.

B. The Petition Must Be Denied Because It Relies On Mischaracterizations Of The Record And The Holding Below.

The Petition contains numerous mischaracterizations of the record and the holding below,[11] only a few of which respondents will address below.

1. The "All About Me" Written Hand-Out Invited Parents To "Share A . . . Story," Not To Read Their Child's Favorite Book.

Busch's statement that "Ms. Reilly offered Mrs. Busch several suggestions, such as reading Wesley's favorite book, preparing a dessert or snack, or one of the other items identified in the invitation to parents" (Petition at 5) is patently misleading.

"Reading Wesley's favorite book" was not an item identified in the "All About Me" handout distributed to parents. The "All About Me" handout invited Busch and other parents to "share a . . . story." Busch admitted this fact. Busch testified that the "All About Me" handout did not say that the School District gives the right to the child to pick his favorite book and have his parent

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[11] Busch also freely misrepresents the positions of the parties in her Petition. For example, she states in footnote 7: "There is no dispute in this case that Marple Newtown's response to Mrs. Busch's attempted speech constituted viewpoint discrimination." Petition at 23 n.7. The actual record in this case is clear as to the true position of the School District. Further, as the Court of Appeals did not decide the case on this alleged basis, Busch's mischaracterization is misplaced in any event.

read it aloud to the class. C.A. App. at 1195. She further testified that she could not point to anything in writing that she ever received from the School District which said that, as part of the "All About Me" classroom exercise, the student is invited to pick his favorite book and have the parent read it aloud to the class. C.A. App. at 1195-1196.

2. Busch's Mischaracterization Of The Third Circuit's Alleged Holding Is Contradicted Within Her Own Petition.

In the section captioned "Reasons for Granting the Petition," Busch describes the holding of the Court below as follows:

> A divided Third Circuit panel held in this case that a public school may engage in viewpoint-related discrimination so long as the school's justification falls within a "range of reasonableness related to preserving the school's educational goals." Pet. App. 20a.

Petition at 11. Similarly, within the Argument section of the Petition, Busch states:

> In addition to the Third Circuit below, which sanctioned viewpoint discrimination by a public school where the restriction was "within a range of reasonableness related to preserving the school's educational goals . . . ."

Petition at 15.

Yet, it is undisputed by both Busch and Judge Hardiman that the Third Circuit did *not* address the alleged issue of viewpoint discrimination in the majority Opinion:

> Judge Hardiman dissented. He first criticized the majority's failure to distinguish between content and viewpoint discrimination.

Petition at 10.

According to Judge Hardiman:

> The Supreme Court has consistently considered two important questions in Free Speech Clause cases involving private speech: (1) whether the state's regulation of speech is based on subject matter or viewpoint; and (2) whether the speech being regulated takes place in a public forum, a limited public forum, or a nonpublic forum. ***The majority does not discuss the first question***.

Pet. App. at 24a (emphasis added).

It is difficult to fathom how a Petition for Writ of Certiorari may be based on an alleged issue that the Court of Appeals below did not address. Nonetheless, Busch and her counsel have chosen to burden this Court with such a Petition.

3. Judge Barry's Concern Was With The Efforts Of Litigants Like Busch To Bring First Amendment Challenges To Kindergarten Show-And-Tell Activities, Not, As The Petition Would Suggest, With The Majority's Holding In This Case.

In footnote 3 of the Petition, Busch misleadingly implies that Judge Barry's concurrence was reluctant and based on the necessity of following Third Circuit precedent:

> Judge Barry concurred, observing that she found "something unsettling about this case and others like it" but nevertheless joined the majority opinion because it "correctly applie[d] Third Circuit precedent." Pet. App. 24a (Barry, J., concurring).

Petition at 10 n.3. Reviewed in its actual context, it is clear that Judge Barry was concerned by the efforts of litigants like Busch to thrust themselves (and the federal courts) into the kindergarten public school classroom in furtherance of their own (and others') agendas:

> We have observed that "at a certain point, a school child is so young that it might reasonably be presumed" that the First Amendment does not protect that child's speech. *Walker-Serrano by Walker v. Leonard*, 325 F.3d 412, 417 (3d Cir. 2003). We have also observed that "[w]here that point falls is subject to reasonable debate." *Id.*

It cannot seriously be a subject of reasonable debate that "that point" is kindergarten. I say this not because Wesley, then age five, could neither read nor write and not because I take issue with his mother's claim that the Bible is Wesley's favorite book and not because, at least in my view, Wesley and his kindergarten classmates would have been unable to understand the excerpts from Psalm 118 that his mother sought to read on his behalf, excerpts which tell us what Israel and the House of Aaron say about the Lord's mercy and note the concept of salvation, a concept I note has been the subject of discussion and debate among biblical scholar for centuries. I say that "that point" is kindergarten because children of kindergarten age are simply too young and the responsibilities of their teachers too special to elevate to a constitutional dispute cognizable in federal court any disagreement over what a child can and cannot say and can and cannot do and what a classmate can and cannot be subjected to by that child or his or her champion.

We send our littlest ones off to school worrying about them and hoping no harm will come to them, but confident in the knowledge that they will be protected and guided and, yes, nurtured by their teachers, who are our surrogates while our children are away. And so I write because I find something unsettling about this case and others like it which, while

> recognizing the crucial importance of age in determining the extent of the First Amendment's protections, have not – at least, not yet – carved out an exception for the little ones but, rather, continue to scrutinize and analyze purported violations of the First Amendment rights of children at the pre-K and kindergarten levels. I nonetheless join Chief Judge Scirica's excellent Opinion because it correctly applies our precedent to the issues before us. Perhaps our next case will tweak that precedent just slightly to accommodate my concerns.

Pet. App. at 23a-24a.

4. Many Statements Of Alleged Fact Set Forth In the Petition Are Not Supported By The Cited Record.

The Petition plays fast and loose with the alleged facts of record. For example:

a. The Petition states at p. 4:

> "According to Wesley, the time he shares with his mother reading the Bible is special to him. *Id.* at 1639."

The Record reveals:

> Wesley did not testify in this case. The cited reference to the record is from his father's deposition, and does not support the statement in the Petition.

b. The Petition states at p. 4:

"At the time of the incident giving rise to this lawsuit, Wesley considered the Bible his favorite book. *Ibid.*"

The Record reveals:

Wesley did not testify in this case. The cited reference to the record is from his father's deposition, and does not support the statement in the Petition.

c. The Petition states at p. 6:

"Mrs. Busch intended to introduce herself to the students and explain that she was there for Wesley's 'All About Me' week, and that Wesley had asked her to read the Bible, his favorite book. C.A. App. 1478."

The Record reveals:

The cited reference to the record does not support the statement in the Petition. It refers to Busch's deposition, where she was asked whether she knew that the teacher, principal, school board members and others were all of the Christian faith before she filed her Complaint alleging that Culbertson Elementary had "animosity towards Christians" and "struggles with the Christian faith."

There are many other statements of alleged fact in the Petition which are not supported by the cited record and which are too numerous to cite here. Clearly, unsupported statements in the Petition cannot form the basis for certiorari review by this Court.

C. That The Third Circuit's Decision Is Allegedly "Erroneous" Is Not A Basis For Certiorari.

Supreme Court Rule 10 provides that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." U.S. S. Ct. R. 10.

In Section B of the Argument Section of the Petition, Busch states that "[t]he Court of Appeals Decision Is Erroneous." The assertion of alleged error is not a basis for review on certiorari. *See* U.S. S. Ct. R. 10.

In addition, Busch's desperate reliance on the same worn-out mischaracterization of the Third Circuit's decision – "The Third Circuit erred in holding that Marple Newtown's viewpoint-based restriction of the speech here was permissible because it was 'within a range of reasonableness related to preserving the school's educational goals'" – must be rejected. A blatant mischaracterization of the holding of the Court of Appeals cannot form the basis for certiorari review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

MARK A. SERENI
Counsel of Record
GREGORY S. GERSON
DIORIO & SERENI LLP
21 West Front Street
Media, PA 19063
(610) 565-5700

ELLIS H. KATZ
JONATHAN P. RIBA
SWEET, STEVENS, KATZ
& WILLIAMS LLP
331 East Butler Avenue
New Britain, PA 18901
(215) 345-9111

Attorneys for Respondents